

APPEARANCES

Claimant appeared by his attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 38 percent work disability for the alleged July 8, 1991, accident and denied all benefits for the alleged August 1992 back injury. The Administrative Law Judge also held that the Workers Compensation Fund was not liable for any portion of the Award because respondent did not have knowledge of preexisting impairment that constituted a handicap.

The parties requested the Appeals Board to review the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of employment with respondent.
- (2) The nature and extent of claimant's disability, if any.
- (3) Claimant's average weekly wage.
- (4) The liability, if any, of the Workers Compensation Fund.

In Docket No. 162,627, claimant alleged a July 8, 1991, date of accident and injuries to the left shoulder and neck. In Docket No. 170,071, claimant alleged an August 25, 1992, date of accident and injuries to the neck, back, and left arm. Although the Administrative Law Judge's Award adjudicated both claims, the Award inadvertently listed only the second docket number on its title page. The parties agreed both claims and docket numbers are before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

Docket No. 162,627 - July 8, 1991 Accident

(1) The Appeals Board agrees with the Administrative Law Judge's analysis and conclusions that on July 8, 1991, claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. On that date claimant injured his left arm, shoulder, and neck while moving a large aircraft strut. Claimant immediately reported the accident and injury to respondent's medical department which referred claimant for treatment.

(2) Claimant eventually came under treatment of board-certified orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster began treating claimant in October 1991 for symptoms described as cervical strain. After a period of conservative treatment and after learning that claimant had degenerative disc disease in the cervical spine, Dr. Eyster referred claimant to two neurosurgeons to obtain their opinion whether claimant was a surgical candidate. Claimant was not.

Dr. Eyster released claimant in June 1992 with permanent restrictions of no lifting greater than 30 pounds, no repetitive pushing or pulling, no overhead work, and no working with his head in one position for prolonged periods. Later, Dr. Eyster modified claimant's permanent restrictions. The doctor indicated he now believes claimant can lift up to 40 pounds on an occasional basis, occasionally reach overhead, and occasionally lift 28 pounds overhead. The final restrictions Dr. Eyster placed upon claimant conform with those board-certified physiatrist, Lawrence R. Blaty, M.D., believes are appropriate. The parties stipulated that claimant has a 4 percent whole body functional impairment as a result of injury to the neck and shoulder regions.

Approximately one week after the July 1991 accident respondent placed claimant in its work pool program where claimant initially pulled up carpet tile. Later, claimant's job changed to dumping trash and even later changed to that of a crib keeper. Claimant continued in the work pool until mid-August 1992 when he returned to his former jig-building department where he was initially assigned the job of painting scaffolding. After the painting was completed, claimant was assigned to other duties and on or about August 25, 1992, allegedly injured his low back while lifting steel shim plates. Claimant allegedly reported that injury to respondent's medical department and was again referred to Dr. Eyster for treatment. After several referrals, claimant came under treatment of Dr. Blaty and received work hardening and pain management therapy.

Claimant testified that shortly after the August 1992 accident he saw Dr. Eyster who confirmed that claimant should not be working. Claimant also testified that after he saw Dr. Eyster he reported back to respondent's medical department which then took claimant off work. Claimant indicated medical treatment continued approximately through May 1993. Despite numerous medical reevaluations by its medical department, respondent did

not return claimant to work but gave him a medical layoff as of June 18, 1993. Since the layoff claimant participated in a vocational rehabilitation program in which he studied aircraft instrument repair. Claimant did not fully complete that training because of complications from an August 1994 automobile accident. At the time of claimant's deposition in December 1995, claimant was unemployed but was searching for work and receiving job placement assistance from the state.

Claimant did not receive work restrictions or limitations arising out of and in the course of his employment with respondent from the alleged August 1992 low back injury. Therefore, claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage is directly related to the injuries sustained in the July 1991 accident. Because his is an "unscheduled" injury, the measure of permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds claimant has a 31 percent work disability for which he is entitled to receive permanent partial general disability benefits. This conclusion is based upon averaging the opinions of loss provided by vocational rehabilitation expert Karen Crist Terrill who testified that claimant lost 12 percent of his ability to perform work in the open labor market considering Dr. Eyster's or Dr. Blaty's permanent work restrictions. Ms. Terrill also testified that claimant retains the ability to earn up to \$11.22 per hour which yields a 50 percent loss of ability to earn a comparable wage when one compares the weekly rate of \$448.80 (\$11.22 times 40 hours per week) to claimant's average weekly wage on the date of accident of \$891.95, as determined below. Although human resources expert Jerry D. Hardin testified on behalf of claimant, the Appeals Board is unable to give much weight, if any, to his testimony because his opinions were not based upon Dr. Eyster's or Dr. Blaty's final work restrictions but, instead, based upon Dr. Daniel D. Zimmerman's restrictions which included significant limitations relating to the low back. Therefore, Mr. Hardin's analysis is founded upon invalid restrictions.

(3) The parties stipulated that for the July 1991 accident claimant's average weekly wage without additional compensation items is \$704.28 and with additional compensation items is \$891.95. Based upon those stipulations, for the period from July 8, 1991, through

claimant's last day of work on August 28, 1992, claimant's average weekly wage is \$704.28. Also, for the period commencing August 29, 1992, when claimant lost his fringe benefits, claimant's average weekly wage is \$891.95.

The respondent and its insurance carrier argued that claimant's additional compensation items should not be included because claimant allegedly left work for reasons other than the left shoulder and neck injuries. The Appeals Board disagrees. First, the evidence fails to establish respondent's contention but, instead, establishes that claimant was terminated as a result of the injuries and restrictions related to the July 1991 accident. Second, the statute which governs average weekly wage, K.S.A. 1991 Supp. 44-511, does not provide exceptions to the inclusion of additional compensation items in the average weekly wage computation when those fringe benefits are terminated.

(4) The Appeals Board agrees with the Administrative Law Judge's analysis that the Workers Compensation Fund has no liability in this proceeding. Before the July 1991 accident, claimant had restrictions and limitations only for a post-operative left carpal tunnel syndrome. Although respondent had knowledge of the carpal tunnel syndrome, that condition neither caused nor contributed to the July 1991 accident nor the resulting disability. Before the July 1991 accident, claimant's left shoulder and neck were asymptomatic and neither restricted nor limited claimant in any manner. Therefore, with respect to claimant's neck and left shoulder, before the July 1991 accident, claimant was not a handicapped individual as defined by K.S.A. 44-566.

Although respondent may have reported claimant as an impaired worker to the State in October 1988, when viewing the evidence as a whole, claimant's alleged impairment did not rise to such character as to constitute a handicap. Claimant did not have permanent work restrictions due to his neck which resolved after an October 1988 accident and remained asymptomatic until the July 1991 accident. The Appeals Board finds claimant's back condition neither impaired nor limited claimant in any manner before the July 1991 accident other than for the incident claimant experienced in 1988 when he banged his head on a wing and was taken to the hospital by ambulance.

Docket No. 170,071 - August 25, 1992 accident

The Appeals Board agrees with the analysis and conclusion of the Administrative Law Judge that claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment with respondent on or about August 25, 1992. A close review of the medical records indicates claimant failed to report to Dr. Eyster that he had injured his low back at work when he saw that doctor on September 1, 1992, only days after the alleged accident. Also, claimant failed to report a work-related low back injury to Dr. Blaty. Ironically, however, approximately two weeks before the alleged

accident, on August 14, 1992, claimant complained to Dr. Daniel D. Zimmerman of low back pain and discomfort to such extent that the doctor thought claimant needed additional diagnostic assessment and that claimant was a poor vocational rehabilitation candidate. That examination was requested by claimant's attorney for purposes of the workers compensation claim filed in connection with the July 1991 accident. When reviewing the entire evidentiary record, the Appeals Board finds that claimant has failed to satisfy his burden of proof. Based upon that finding, all remaining issues surrounding the August 1992 alleged accident are rendered moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated April 1, 1996, should be, and hereby is, modified as follows:

Award in Docket No. 162,627

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William L. Duncan, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury on July 8, 1991, and based upon an average weekly wage of \$704.28, until August 28, 1992, and an average weekly wage of \$891.95 after that date.

Claimant is entitled to 133.57 weeks of temporary total disability benefits at the rate of \$289 per week or \$38,601.73, plus 60 weeks of permanent partial general disability benefits at the rate of \$18.78 per week, or \$1,126.80, for a 4% whole body functional impairment which represents the period from July 8, 1991, to September 1, 1992, plus 221.43 weeks of permanent partial disability benefits at the rate of \$184.35 per week, or \$40,820.62, for a 31% work disability for a total award of \$80,549.15.

As of October 18, 1996, there is due and owing claimant 133.57 weeks of temporary total disability compensation at the rate of \$289 per week, or \$38,601.73, plus 60 weeks of permanent partial disability compensation at the rate of \$18.78 per week, or \$1,126.80, plus 82 weeks of permanent partial disability compensation at the rate of \$184.35 per week, or \$15,116.70, for a total due and owing of \$54,845.23 which is ordered paid in one lump sum less any amounts previously paid.

The remaining balance of \$25,703.92 is to be paid for 139.43 weeks at the rate of \$184.35 per week until fully paid.

Award in Docket No. 170,071

WHEREFORE, an award of compensation for benefits in the above-mentioned case is hereby denied in accordance with the above findings.

The Appeals Board hereby adopts the orders of the Administrative Law Judge regarding payment of administration expenses as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Frederick L. Haag, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director